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In the Supreme Court of the United States

OCTOBER TERM, 1982

THE FIRST NATIONAL BANK OF OMAHA,
EXECUTOR OF THE ESTATE OF GLENN W. MCININCH,
DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The question presented in this federal estate tax case is whether the decision below correctly held that petitioner was not entitled to a charitable deduction under Section 2055 of the Internal Revenue Code of 1954 (26 U.S.C.), for a bequest in trust for the maintenance of a secular, private cemetery, and the donor's family plot in that cemetery.

The pertinent facts may be summarized as follows: In his last will and testament, the decedent, Glenn W. McInnch, bequeathed $100,000 to Walnut Grove Cemetery Association to be maintained in a Perpetual Care Trust Fund pursuant to Section 12-510 of the Neb. Rev. Stat. (1943) (Pet. App. 9-10). The decedent's will provided that the Omaha National Bank was to be the trustee of the Fund,

and that the earnings of the Fund "to the extent permitted by Nebraska law shall be applied first toward the maintenance of the McInnich family plot" and then toward the general maintenance and beautification of the entire Walnut Grove Cemetery (Pet. App. 9-10). Walnut Grove Cemetery is not affiliated with any religious organization, and the only precondition for burial there is the purchase of a grave site (Pet. App. 6-7).

In this refund suit brought by petitioner in the United States District Court for the District of Nebraska after the Commissioner disallowed the charitable deduction for the bequest, the district court ruled in favor of the government on the ground that the Internal Revenue Code contains no authorization for the estate tax deduction of a bequest for the maintenance of a secular, privately owned cemetery (Pet. App. 17). The court of appeals affirmed on the ground that the bequest was not charitable because the trust provision for the maintenance of the McInnich family plot indicated the decedent's intention to give absolute precedence to noncharitable beneficiaries, *viz.*, the McInnich family (Pet. App. 18-20). The court further held that the reference to Nebraska law in the will did not impose any meaningful restrictions on the private uses authorized by the decedent (Pet. App. 19-20).

1. The decision below is correct. The decedent's will provided that the trust income was to be applied first to the maintenance of the McInnich family plot, and the balance to the general maintenance of the cemetery. The precedence to be given the McInnich family precludes characterization of the gift as charitable. As a general matter the existence of a private benefit that is more than incidental in nature will nullify the deductibility of a bequest otherwise restricted to public charitable use. For example, in *Griffin* v. *United States*, 400 F.2d 612, 616 (6th Cir. 1968), upon which the

court of appeals relied, the court held that a bequest in trust "for the education of my grandchildren and for the education of deserving boys and girls" was not deductible.

Moreover, the court correctly concluded that the bequest was not restricted to public benefit by the reference in the will to Nebraska law. Section 12-510 of the Neb. Rev. Stat. (1943), the statute under which the trust was expressly created (Pet. App. 9-10), provides for "perpetual special care trusts" for the benefit of burial lots, tombstones or other monuments. It further provides that the income earned on such trusts "shall be used solely for the purposes of perpetual special care as set forth in the respective trust agreements made between the association and said donors." Thus, contrary to petitioner's assertion (Pet. 2), the use of the funds for the McInnch family plot, as authorized by the will, was permitted and unrestricted by the pertinent statute, Section 12-510 (Neb. Rev. Stat.). Accordingly, the court below properly ruled that the bequest was not for exclusively charitable purposes, and hence not deductible.

At all events, although the court of appeals did not reach the issue, we submit that even if the bequest were applicable only to the maintenance of the cemetery in general, it would nevertheless be nondeductible under the decisions of every court that has considered the question. The courts have uniformly held that Section 2055 contains no authorization for a deduction of bequests in favor of secular cemeteries. *E.g., Child* v. *United States*, 540 F.2d 579 (2d Cir.), cert. denied, 429 U.S. 1092 (1976); *Gund's Estate* v. *Commissioner*, 113 F.2d 61 (6th Cir.), cert. denied, 311 U.S. 696 (1940); *Estate of Amick* v. *Commissioner*, 67 T.C. 924 (1977); *Bank of Carthage* v. *United States*, 304 F. Supp. 77 (W.D. Mo. 1969); *Estate of Wood* v. *Commissioner*, 39

T.C. 1 (1962); *Estate of Haley* v. *Commissioner*, 17 T.C.M. para. 48,191 (1948); *Wilber National Bank* v. *Commissioner*, 17 B.T.A. 654 (1929).[1]

2. Contrary to petitioner's further claim, the decision below does not violate either Article IV, Section 1, of the United States Constitution, the full faith and credit clause, or the right to equal protection under the Fifth Amendment. Petitioner's so-called full faith and credit argument, which was not raised in the court below, amounts to a contention that the court of appeals ignored restrictions on the use of perpetual care trust funds under Section 12-509 of the Neb. Rev. Stat. (1943) (Pet. 8-9). The bequest here, however, established a trust fund not under Section 12-509, but rather under Section 12-510 of the Neb. Rev. Stat. (1943) (Pet. App. 9-10). As we have pointed out (*supra*, pages 3-4), the court of appeals gave full consideration to the extent the use of the trust income was restricted under the latter Nebraska statute.

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[1]Petitioner does not contend that the decision below conflicts with any other decision of any circuit. Petitioner's reliance (Pet. 6-8) upon various state court decisions, which hold that trusts established for the maintenance of private cemeteries are charitable for particular purposes of state law, has no bearing on the federal estate tax question presented.

Finally, in claiming (Pet. 7) that the decision below conflicts with *Hopkins* v. *Grimshaw*, 165 U.S. 342 (1897), petitioner misstates the holding in that case, which is, at all events, irrelevant. In that case, the decedent bequeathed land to a society in trust for use as a cemetery. When that use ceased, the heirs of the decedent claimed that the land should revert to them. The Court, expressing doubts over the charitable nature of the bequest (*id.* at 353), held that "in any aspect of the case" (*id.* at 358), *i.e.*, whether the original bequest was charitable or not—the heirs were entitled to the land as beneficiaries of a resulting trust (*ibid.*).

Petitioner's equal protection claim, based on the different treatment accorded church cemeteries, has no bearing on the facts of this case. The court below rested its decision on the private benefits inherent in the bequest and not on the charitable or noncharitable nature of cemetery maintenance functions. But even if the different treatment traditionally accorded church cemeteries from other cemeteries under Section 2055 of the Code were at issue in this case, there is no merit to petitioner's argument that this different treatment violates any right to equal protection. Religious organizations have traditionally been accorded preferential tax treatment. In enacting tax laws, it is well settled that governments can properly consider religious groups as beneficial and stabilizing influences on community life, and can also consider a classification based on religion to be useful, beneficial, and in the public interest. See *Walz* v. *Tax Commission*, 397 U.S. 664, 672-673 (1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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